Supreme Court, U.S.
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86-82

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER F. RECKMEYER, II

Petitioner,

VS

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the District Court required to inform the Petitioner and determine that he understood the nature of the forfeiture component of the Continuing Criminal Enterprise charge to which he entered his plea of guilty?

2. May the government—under the guise of providing relevant information to the sentencing court—intentionally breach an express promise of use immunity it made to induce Petitioner's guilty pleas and cooperation?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Christopher F. Reckmeyer, II, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals enforced on March 21, 1986.

OPINION BELOW

On March 21, 1986, the United States Court of Appeals for the Fourth Circuit affirmed Petitioner's convictions for Continuing Criminal Enterprise in violation of 21 U.S.C. § 848, and two tax offenses. On April 30, 1986, the Fourth Circuit denied Mr. Reckmeyer's *Petition for Rehearing En Banc.* Copies of the Court's opinion and Order denying said *Petition* are attached hereto as Appendices A-1 and A-2, respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). See Supreme Court Rules 17.1(a), (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule 11(c)(1), Fed. R. Crim. Pro.
2. Rule 31(e), Fed. R. Crim. Pro.
3. 21 U.S.C. § 848(a)
4. 21 U.S.C. §§ 853(a) and (d)

(See Appendix for full text.)

STATEMENT OF THE CASE

On January 9, 1985, the Grand Jury for the Eastern District of Virginia returned a sealed indictment charging the Petitioner with violation of the Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. § 848, and numerous related offenses. (J.A. 10-113).[1] On January 14, 1985, the District Court entered a Restraining Order prohibiting Mr. Reckmeyer from disposing of assets identified in Count Two(B) of the indictment as subject to criminal forfeiture pursuant to 21 U.S.C. § 853. On January 15, 1985, the indictment was unsealed, and commencing in the pre-dawn hours, law enforcement agents, acting pursuant to search warrants and the Restraining Order seized the assets so identified, including all of Petitioner's personal property, real property and funds, and all assets of several corporations he purportedly controlled.

On March 14, 1985, pursuant to a cooperation/plea agreement, Mr. Reckmeyer entered guilty pleas to the CCE charge and to two counts of filing false tax returns in violation of 26 U.S.C. §7206, and further agreed to enter into a consent decree forfeiting the assets set forth in Count Two (B). (J.A. 228-236).

On May 6, 1985, Mr. Reckmeyer moved to withdraw his guilty pleas pursuant to Rules 11 and 32, Fed. R. Crim. Pro. (J.A. 167-188). On May 17, 1985 the Court denied that motion, (J.A. 354), and sen-

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[1] J.A. cites refer to the Joint Appendix prepared by counsel below in accordance with Rule 10, Fed. R. App. Pro. and the Fourth Circuit Rules. The Joint Appendix is comprised of all documents, pleadings and transcripts that the parties agree are relevant to the Appeal.

tenced Mr. Reckmeyer to seventeen years imprisonment (J.A. 389).

STATEMENT OF FACTS

Christopher F. Reckmeyer, II, was charged, along with his brother Robert Reckmeyer, as a so called "king-pin" of an organization that allegedly distributed millions of dollars worth of marijuana and hashish in the United States from 1972 to 1984.

On May 14, 1985, four days before his trial was to commence, the Petitioner entered an agreement with the United States which provided *inter alia* that he would fully cooperate with the government; that he would enter pleas of guilty to the CCE charge and to one personal and one corporate tax count, and agree to forfeiture of the assets as set forth in Count Two(B): and that the Court would be bound, pursuant to Rule 11(e)(1)(C), Fed. R. Crim. Pro., to impose an aggregate sentence of no more than 20 years on the three charges. (J.A. 228-236).

In exchange for Petitioner's pleas and cooperation, the government expressly promised, among other things, that it would not "use against [him] anything he said to law enforcement agents, government attorneys, to any grand juries or at any trials unless he should make false statements or commit perjury." (J.A. 231.)

On the date the agreement was executed the Petitioner appeared before the District Court to enter his pleas. The Rule 11 proceeding was interrupted by Petitioner's refusal to plead to one tax count despite the terms of the plea agreement, the concomitant

substitution of another acceptable tax count, and by his repeated disagreements with the prosecutor's statements regarding the factual basis for the CCE charge and the scope of the illegal enterprise, including his profits therefrom (J.A. 219).[2]

During the Rule 11 proceeding the Court ascertained that the Petitioner had discussed "the nature and elements of the charges" with his counsel, and that he understood those charges. (J.A. 198). The following colloquy then ensued:

> Question: Do you understand that Count 2 charges you that in 1974 and continuing up to and including the return of the indictment, which is on January 9, 1985, that you, along with your brother Robert Reckmeyer, and Bruce Thomasen did willfully engage in a continuing criminal enterprise in that you, along with Mr. Thomasen and your brother Robert Reckmeyer, did willfully and unlawfully in violation of Title 21, U.S.C., 841(a)(1), including violations that are alleged in Counts 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the indictment, and that you have a continuing enterprise for violation of the Comprehensive Drug

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[2] Petitioner acknowledged that he was involved in a continuing criminal enterprise (J.A. 211) but took vigorous issue with the the government's statement of facts, asserting at one point: ". . .the facts stated are not the full facts to my knowledge" (J.A. 210); and at another point: "I'm disputing almost every single fact as stated in their facts." (J.A. 211). Moreover, he emphatically denied the government's claim that he was involved in the distribution of over one hundred million dollars of marijuana, and had received over ten million dollars of profits, claiming instead involvement in "maybe one-third of that", and "maybe three-plus million dollars in profits." (J.A. 219).

Abuse Control Act of 1970, 21 U.S.C. 801, that was undertaken by your (sic), your brother, and Bruce Thomasen in concert with at least five other persons, and that you occupied, along with Robert Reckmeyer and Bruce Thomasen, a position of organizer, supervisor and manager of a continuing series of violations from which you obtained substantial income and profit and resources. Do you understand that charge against you, Count 2.

Answer: Can I?

Question: Yes, sir, go ahead and talk to your lawyer. Do you understand the charge in Count 2?

Answer: Yes, sir, I do, Your Honor.

Question: You've gone over this indictment with your counsel prior to coming here this afternoon?

Answer: Yes, sir, I have.

Question: Do you understand that count carries a minimum of ten years in jail to life imprisonment and forfeiture of all profit and interest in the enterprise? Do you understand that?

Answer: Yes, sir, I do.

(J.A. 198-199)

Although the Petitioner was informed two additional times that the terms of his cooperation/plea agreement required the forfeiture of his assets (J.A. 192, 202) he was not informed—nor did the court determine that he understood—that forfeiture was an element of the CCE charge, that forfeiture of his

assets was not a necessary or inevitable consequence of a guilty verdict, and that if he elected to go to trial he would be entitled to a special jury verdict as to each asset sought to be forfeited. See discussion, *infra*, pages 11-13.

Prior to sentencing, Petitioner moved to strike the following paragraph contained in the section entitled "Government's Version of the Offense" of his presentence report:

> In late Summer or early Fall 1984, while still under investigation, Christopher Reckmeyer purchased 21,000 pounds of high grade marijuana known as Sensemilla. In December 1984, at about the same time that Christopher Reckmeyer appeared before the December 19, 1984 grand jury investigating him, Christopher Reckmeyer made his last payment for the purchase of the Sensemilla which would have had a total wholesale purchase cost to Reckmeyer of approximately $12.6 million. Also, while still under investigation, Christopher Reckmeyer placed an order for 100,000 pounds of Sensemilla at an estimated purchase price of $600 per pound, which Reckmeyer was to receive during the fall of 1985 harvest season. (J.A. 293.)

Upon questioning by the Court, the government admitted that this information had been provided to the government by Petitioner during the cooperation debriefings (J.A. 352), and had been selectively chosen for presentation to the Court at sentencing. (J.A. 353). The Petitioner's motion to strike and his oral motion to vacate his guilty pleas were denied. (J.A. 354).

REASONS FOR GRANTING CERTIORARI

The issues raised by this Petition reflect serious problems in implementation and administration of two of the most important weapons in the government's war against organized crime: (1) criminal forfeiture, and (2) guilty pleas and cooperation. The significance of this case thus goes well beyond the injustice done Petitioner—indeed to the very heart of our system of criminal justice.

The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §841, *et seq.* greatly expanded the government's rights to criminal forfeiture in a CCE case. 21 U.S.C. §853, which sets forth the criminal forfeiture problems of the Act now closely parallels the RICO forfeiture provisions of 18 U.S.C. 1963. Moreover, the Act permits the government—for the first time—to seek criminal forfeiture in *any* case involving a felony narcotics offense. Although no empirical studies are available, it is well recognized that over the past several years the government has increasingly resorted to use of criminal forfeiture in both narcotics and RICO cases. See generally, Smith, *Prosecution and Defense of Forfeiture Cases* (Matthew Bender, 1985).

Nevertheless, as the facts of this case make abundantly clear, the district courts have been provided with little or no practical guidance as to their responsibilities under Rule 11 in accepting guilty pleas in cases involving criminal forfeiture. The issue raised by this Petition is one of first impression: whether a trial court is required by Rule 11(c)(1) to inform the accused and determine that he understands the complex nature of the forfeiture component of the CCE

charge.[3] Because of the government's ever increasing use of criminal forfeiture, and the magnitude and importance of the cases where such forfeiture is sought, it is incumbent upon this Court to resolve that issue and precisely delineate the trial court's responsibilities in this potentially troublesome area. If this problem is permitted to fester and percolate without resolution, the inevitable and undesirable result will be inconsistency and injustice to the government and to defendants.

The second issue raised by this Petition is of equal significance. Guilty pleas and cooperation have become a powerful, if not essential, weapon in the government's strategic arsenal. Yet, as the facts of this case make clear, this weapon can easily be wielded in an unfair manner. Here the government induced the Petitioner to plead guilty and cooperate by promising him that any statements he made during his cooperation "would not be used against him." Then, in the guise of providing relevant information to the sentencing court, the government selected Petitioner's most damaging—and only his most damaging statements—for inclusion into his presentence report.

The government's disingenuous efforts to turn Petitioner's cooperation/plea agreement on its head requires the scrutiny of this Court if good faith plea bargaining—essential to the administration of justice—is to remain intact. Petitioner asks this Court to stake out clearly the boundaries of permissible gov-

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[3] In addressing this issue below the Fourth Circuit merely stated—without reference to any authority—"we disagree," Appendix at 129, and empahsized that the Petitioner had been properly advised of the consequences of forfeiture, a matter not in dispute. *Id.*

ernment conduct in giving meaningful effect to promises made to defendants to induce them to plead guilty and cooperate. Without a firm and clear message from this Court, it will be impossible to fashion plea and cooperation agreements that will protect defendants from the actions of an overzealous prosecutor. This is an untenable state of affairs in a criminal justice system that depends to a large extent on guilty pleas and cooperation.

I. RULE 11 REQUIRES THE TRIAL COURT TO INFORM THE ACCUSED AND DETERMINE THAT HE UNDERSTANDS THE NATURE OF THE FORFEITURE COMPONENT OF THE CCE CHARGE.

It is a fundamental tenet of our system of justice that guilty pleas must be made "knowingly", i.e., with a full understanding of the nature of the charge to which the plea is entered, and of the consequences of that plea. *McCarthy v.United States*, 394 U.S. 459 (1969). This requirement:

> . . .arises from the guilty plea as perhaps the supreme instance of waiver known to our system of justice, one by which all of its trial rights and safeguards are voluntarily foregone, and the defendant deliberately submits to conviction. If this is to be permitted, at the minimum a decent system of justice will concern itself that the admission is voluntary and the defendant knows what it is he is admitting, so that he does not mistakenly consent to be punished for a crime he did not commit. These are core considerations, requirements that manifestly must lie at the heart of any respectable system for settling (as opposed to trying) criminal charges.

United States v. Dayton, 604 F.2d 931, 935 (5th Cir. 1979).

The explicit provisions of Rule 11, Fed. R. Crim. Pro. are designed to ensure that those concerns are implemented by the trial courts in a practical and consistent manner. *Advisory Committee Notes to Rule 11.*

Rule 11(c)(1) requires that before accepting a guilty plea "the court must address the defendant personally in open court and inform him of, and determine that he understands the nature of the charge to which the plea is offered and the maximum possible penalty required by law. . . ." Failure to comply with Rule 11(c)(1) constitutes an "entire failure to address a core concern of Rule 11" and invariably mandates vacation of a guilty plea. *United States v. Punch*, 709 F.2d 889, 891 (5th Cir. 1983); *see also, United States v. Corbett*, 742 F.2d 173, 180 (5th Cir. 1984).

Rule 11(c)(1) imposes two interdependent responsibilities upon the trial court: (1) to inform the accused of the nature of the charge against him and (2) to determine that he understands the nature of the charge. These obligations may not be delegated to either the prosecutor or defense counsel. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); *See also, United States* v. *Carter*, 662 F.2d 274, 276 (4th Cir. 1981). The objective of Rule 11(c)(1) is "to insure that the defendant who pleads guilty has made an informed plea." *Advisory Committee Notes to Rule 11.*

Fulfillment of those responsibilities is especially critical where the accused has been charged with Continuing Criminal Enterprise, an offense constituted by a complex statutory scheme of prosecution and punishment which has been further refined by case law,

and which involves a precise interplay of factual and legal concepts beyond the understanding of the lay defendant.[4] As noted by one court, "charges of a . . . complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind may require more explication" at a Rule 11 proceeding than a simple charge. *United States v. Dayton*, 604 F.2d 931, 937-928 (5th Cir. 1979).[5]

The CCE charge brought against Petitioner had two components: (1) the substantive CCE charge set forth in Count Two, and (2) the criminal forfeiture set forth in Count Two (B). The issue raised by this Petition is whether the court is required by Rule 11(c)(1) to inform and determine not only that the accused understands the "nature" of the substantive CCE charge, but the "nature" of the forfeiture as well. Specifically, Petitioner contends that in order to comply with Rule 11(c)(1), the court must inform and determine that the accused understands:

1) That forfeiture is an element of the crime as charged,

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[4] The essential elements of the substantive CCE charge set forth in 21 U.S.C. §848 have been determined by the courts to be: 1) a felony violation of the federal narcotics laws; 2) as part of a series of three or more violations; 3) taken in concert with five or more persons; 4) for whom the accused is an organizer, supervisor or manager; and 5) from which he derives substantial income or resources. *United States v. Lurz*, 666 F.2d 69, 75 (4th Cir. 1981). Moreover, the court "shall order" the defendant to the forfeiture prescribed in Section 853. 21 U.S.C §853(b).

[5] Even a conspiracy charge "is not so simple that a lay person can be expected necessarily to understand it." *United States v.Coronado*, 554 F.2d 166, 172 (5th Cir. 1977); see also, *United States v. Wetterlin*, 593 F.2d 346, 350 (7th Cir. 1978).

2) That had he gone to trial the government would have to meet certain proof requirements for forfeiture as set forth in 21 U.S.C. §853, and

3) That at trial he would be entitled to a special jury verdict as to each asset sought to be forfeited.

Forfeiture is not a mere collateral consequence of the CCE charge, but arises directly from the substantive CCE violation: "The Court, in imposing sentence shall order in addition to any other sentence imposed, that the person forfeit all property described in this subsection." 21 U.S.C. §853(a). Criminal forfeiture proceedings under 21 U.S.C. §848 are *in personam*, *United States v. Long*, 654 F.2d 911, 914 (3rd Cir. 1981), and as such, §853 forfeiture must be specifically pleaded in the indictment, *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983). Significantly, the defendant is entitled at trial to a special verdict as to *each* asset sought to be forfeited, Rule 31(e), and according to the Advisory Committee Notes to Rule 31(e): "The assumption of the draft is that the amount of property suspect to criminal forfeiture is an element of the offense to be alleged and proved." Additionally, the court must ascertain a factual basis for criminal forfeiture as well as the substantive charge. *United States v. Roberts*, 749 F.2d 404 (7th Cir. 1984).[6]

Consistent with the comprehensive manner in which forfeiture is treated throughout the CCE statute, 21 U.S.C. §853 sets forth in detail the government's proof requirements for criminal forfeiture at trial, 21 U.S.C. §853(a) carefully defines the property subject

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[6] The Fourth Circuit apparently agrees. See Appendix at 139.

to criminal forfeiture, and Section 853(d) establishes a rebuttable presumption at trial:

> That any property of a person convicted of a felony under this subchapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that (1) such property was acquired by such person during the period of the violation of the subchapter or within a reasonable time after such period; and (2) there was no likely source for such property other than the violation of this subchapter or subchapter 2 of this chapter.

While Congress did not intend that the government's burden of proving forfeiture at trial be a heavy one, it intended that there should be some burden, and a guilty verdict as to the substantive CCE charge therefore does not preclude a jury from finding that any—or all—of the accused's assets are not forfeitable.

Forfeiture is therefore an essential part of the comprehensive crime and sanction of the CCE statute and in order for the accused to enter an "informed" plea to the CCE charge, the court must inform him and determine that he understands what the government needs to do to prove forfeiture of any asset as well as what the government must do to prove the substantive offense.

The fundamental necessity and purpose of ensuring that the accused fully understands the requirements of the statutory scheme for forfeiture is made manifest by the facts of this case. Here the Petitioner, by virtue of his guilty plea, agreed to forfeit every

asset he owned, leaving him and his family—including four young children—homeless and virtually penniless. The Rule 11 proceeding was replete with unresolved disagreements between the Petitioner and the government as to the scope of his involvement in the continuing criminal enterprise and the amount of profits he made therefrom, but devoid of a single admission by Petitioner that the assets sought to be forfeited were the fruits of any illegal narcotics activities. Moreover, nothing on the record below permits an inference that Petitioner was aware of or understood that his guilt as to the substantive CCE charge would not necessarily be dispositive of the forfeiture issue. Despite having duly been placed on notice that the issue and scope of the proposed forfeiture was in question, the court failed to engage the Petitioner in even a rudimentary dialogue designed to ensure that he understood the nature and enormous significance of the forfeiture. To pretend—as the Fourth Circuit did below—that forfeiture is a mere collateral consequence of a guilty plea, is to ignore the comprehensive statutory scheme of the CCE offense and the very purposes for which Rule 11 was enacted.

II. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE GOVERNMENT INTENTIONALLY BREACHED ITS USE IMMUNITY PROMISE MADE TO HIM TO INDUCE HIS GUILTY PLEAS AND COOPERATION.

Petitioner's cooperation/plea agreement required him to waive his Fifth Amendment rights and cooperate with the government in exchange for certain expressly stated protections. Among the most impor-

tant of those protections was the government's unambiguous promise that it "would not use against the defendant anything he said to law enforcement agents, government attorneys, or at grand juries or at any trials, unless he should make false statements or commit perjury." (J.A. 231).

Despite this promise, the government intentionally provided to the probation office—for inclusion into Petitioner's presentence report and to influence the Court at sentencing—information outlining his involvement in narcotics trafficking even while he was "under investigation" as late as the fall of 1984. (J.A. 293). This information was obtained from Petitioner during the cooperation process. *Id.* Moreover, the government did not dispute defense counsel's claim that the government selected "the most damaging information that the defendant gave about himself in these many debriefings, ignoring ninety-eight percent of everything else he said. . ." (J.A. 351). Indeed, the prosecutor acknowledged: "what we did was use that portion of Mr. Reckmeyer's statement which helped to further explain the facts of the offense which he committed." (J.A. 353.) In short, the government has wisely made no claim that Petitioner's statements were not used "against" Petitioner.

In rejecting Mr. Reckmeyer's appeal, the Fourth Circuit sanctioned the government's outrageous conduct and concluded that the government's unambiguous promise—broad on its face—was simply a promise "not to use such information against him only in other prosecutions," and did not relate "to sentencing procedures." (Appendix at 18a, 19a) No authority was cited for this astounding interpretation.

Instead, the Fourth Circuit relied on two cases, *United States v. Avery*, 621 F.2d 214, 215-16 (5th Cir. 1981), and *United States v. Block*, 660 F.2d 1086 (5th Cir. 1981), both of which hold no more than the government cannot bind itself "to stand mute in the face of factual inaccuracies or to withhold relevant factual information," from the sentencing court, *United States* v. *Block*, *supra.*, at 1088 n.3. These cases are clearly inapposite to the instant case where the government did not merely promise to remain mute at sentencing, but expressly promised that the information Petitioner provided during his cooperation "would not be used against him." The nature of the government's express promise to the Petitioner and the manner in which it breached that promise therefore implicates due process principles not present in either *Block* or *Avery*.

Promises resulting from the negotiation of the plea agreements, whether directly or indirectly made, must be fulfilled to their lawful extent. *Santobello* v. *New York*, 404 U.S. 257, 260 (1971); *United States* v. *Bowles*, 585 F.2d 851, 853 (7th Cir. 1978) at *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979).

The language of the cooperation/plea agreement establishes beyond doubt that the Petitioner agreed to waive his constitutional right to a jury trial and cooperate only because the government expressly promised that the statements he made pursuant to his cooperation would not be used against him. To construe the language otherwise would render the language "mere surplusage" and vitiate the very assurances the Petitioner sought and obtained in order to make such statements in the first place. *See*

United States v. *Bowles*, *supra*, at 853-54.[7] Put simply, it makes no sense that Petitioner —or any defendant— would enter into a good faith agreement requiring him to waive his Fifth Amendment protections and make damaging admissions to the government if the government could then—without the slightest restriction—select his most damaging admissions to influence the sentencing judge. Allowing Petitioner's plea to remain in effect when it so rests to "a significant degree" on a promise breached by the government amounts to a violation of his due process rights. *See Santobello* v. *New York*, 404 U.S. at 263-67 (Douglas, J., concurring); *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979) (government's failure to fulfill plea agreement violates due process).

In *United States* v. *Cook*, 668 F.2d 317 (7th Cir. 1982) the government did not merely agree to stand mute at sentencing, but instead agreed to make no recommendation and "to not offer anything in aggravation." *Id.* at 318. After the plea, and pursuant to "standard practice" the prosecutor made available the defendant's case file to the probation officer. *Id.* The probation officer thereupon incorporated into the presentence report certain information from that file.

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[7] The Fourth Circuit suggests that "the government could have avoided confusion over the plea agreement by more careful craftsmanship in the agreement." Slip Op. at 21. This suggestion ignores the unambiguous language of the agreement, as well as subsequent correspondence from Petitioner's counsel to the prosecutor confirming that "you have advised me that any statements Chris makes during the course of any debriefing during the cooperation phase of his Agreement cannot be used against him in any criminal case. . ." with two exceptions which are not relevant to the issues raised herein. J.A. 307.

Although the government's good faith was not at issue, and even though the government did not actively seek to include this information in Cook's presentence report, the Court of Appeals, citing *Santobello*, reversed, noting that:

> Although we also entertain substantial doubt as to whether the Government could lawfully withhold relevant information from the sentencing court, we do not find that issue to be dispositive in this case. *Regardless of whether the Government has the authority to withhold relevant information, if it did in fact promise to do so, then Cook is nevertheless entitled to relief.*

Id. at 320. (Footnote and Citation omitted) (Emphasis added) The court rejected outright the government's contention that *Avery* was controlling because:

> . . . *the promises are significantly different.* In *Avery*, the Government had promised only that it would make no recommendation and stand mute at the time of sentencing. Here, however, the government promised that it would "not offer anything at all in aggravation." The government's promise in this case is much broader than the one made in *Avery*. For us to construe that promise to apply only to the United States Attorney's oral comments to the judge at the time of sentencing would be to read into it limitations which it does not otherwise contain.

Id. at 320-21. (Footnote omitted)(Emphasis added)

Cook is compellingly analogous to the present case. Here the government also went beyond a mere promise to remain mute; it made an explicit promise not

to use Petitioner's statements against him. The promise—whether enforceable or not—was made, it was breached, and purposely so. *See also United States* v. *Hammerman,* 528 F.2d 326, 328 (4th Cir. 1975) (a plea based on an "unfulfillable" promise by a prosecutor as to the actual sentence the judge would impose was vacated "although the promise was made in good faith; what matters is it was probably relied upon, was not fulfilled and was unfulfillable.")

Because of the obvious disparities in the factual situations confronting the Courts of Appeal, *Avery* and *Block* can be reconciled with *Cook*. But mere reconciliation of these cases will not solve the issue—certain to be raised in many future cases—of how to interpret and enforce the government's obligations under a plea/cooperation agreement. By permitting the government to unilaterally interpret its obligations under the cooperation/plea agreement, and by refusing to impose even minimal good faith standards for providing "relevant information" to the sentencing court in these circumstances, the Fourth Circuit has created an intolerable schism between the government's desire to obtain guilty pleas and cooperation and the scope of the government's good faith obligations to give meaningful effect to promises it makes to induce such cooperation and pleas. If the Fourth Circuit's decision is left intact, a defendant cannot be protected from the possibility that an overzealous prosecutor will first use his cooperation, then turn around and selectively choose the most damaging admissions from his own mouth to influence the sentencing judge. In a system of laws and justice, this possibility cannot be permitted or condoned.

CONCLUSION

The Fourth Circuit affirmed Petitioner's convictions although the record disclosed that the trial court had not informed him and determined that he understood the forfeiture component of his CCE charge, and despite evidence that the government intentionally breached its express promise not to use his own statements against him. Given the significance of these issues to the fair and efficient administration of justice, a Writ of Certiorari should issue to review the Fourth Circuit's judgment and opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 1986, a copy of the foregoing was mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

STANLEY J. REED

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5158

UNITED STATES OF AMERICA,

Appellee,

versus

CHRISTOPHER FREDERICK RECKMEYER,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge

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FILED
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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Widener and Judge Phillips.

For the Court,

/s/JOHN M. GREACEN

CLERK

SPROUSE, Circuit Judge:

Christopher Reckmeyer appeals the district court's order denying his motion to withdraw his plea of guilty to a violation of the continuing criminal enterprise (CCE) statute, 21 U.S.C. § 848, and to two counts of filing false tax returns in violation of 26 U.S.C. § 7206.[1] Reckmeyer also asserts that the district court should have permitted him to withdraw his plea because the government violated the plea bargain agreement. In exchange for the guilty plea, the government agreed, *inter alia,* that it would not use against Reckmeyer anything he said "to law enforcement agents, government attorneys, to any grand juries or at any trials unless he should make false statements or commit perjury." Reckmeyer claims the government violated this provision by providing detrimental information to the probation office for use in Reckmeyer's presentence report. He also contends that the district court violated Fed. R. Crim. P. 11 by failing to inform him properly of the elements of the CCE charge and resulting forfeiture and by not determining the factual basis for forfeiture. We affirm.

Reckmeyer and a number of individuals operated a large marijuana and hashish distribution ring for over ten years. In January 1985, a grand jury indicted him for conducting a continuing criminal enterprise and for thirteen related offenses. He negotiated a plea bargain agreement and pled guilty. The agreement was extensive and included the statement that Reckmeyer was the leader of an organization responsible for the distribution of a total of more than one hundred sixty-nine tons of marijuana and more than ten tons of hashish in the course of fifty ventures in

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[1] The district court sentenced Reckmeyer to 17 years imprisonment on the CCE count. The CCE conviction also required the forfeiture of Reckmeyer's extensive holdings in real and personal property which he had acquired with the profits from his drug operations. The court also sentenced him to two two-year terms on the tax counts to run concurrently with his CCE Sentence.

Virginia and elsewhere, and that he supervised approximately twenty employees in this illegal enterprise.[2] The plea agreement required Reckmeyer to forfeit forty-one assets specifically listed in Count 2(B) of the indictment, and any proceeds from those assets, and "all other domestic and foreign assets in which he has any direct or indirect interest or control, which are the proceeds of unlawful drug activities or are directly or indirectly related to unlawful drug activities." The government agreed to dismiss the remaining counts and not to use against him his statements made during his debriefing by government attorneys and agents. During debriefing, Reckmeyer informed government agents that in late summer or early fall 1984, while he was under investigation, he purchased 21,000 pounds of marijuana. He also ordered another 100,000 pounds for receipt in the fall of 1985. The government made this information available to the probation officer conducting the presentence investigation. The probation officer included it in his report to the district court.

I.

We consider first Reckmeyer's contention that the district court failed to comply with the requirements of Fed. R. Crim. P. 11(c).[3] Reckmeyer asserts that the district

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[2] At the Rule 11 hearing, Reckmeyer disputed the exact tonnage of narcotics which his organization distributed, but not the number of distribution ventures. He also did not dispute that the quantities were enormous.

[3] Fed. R. Crim. P. 11(c) provides:

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special

court failed to inform him of the nature and the elements of the CCE charge and the forfeiture sanction resulting from a CCE conviction. He contends that the court did not inform him that the government must prove (1) that he had committed a predictate Title 21 offense; (2) that such violation was a part of a continuing series of at least three Title 21 violations; and (3) that he acted in concert with five or more people as their organizer or supervisor in committing these violations.

We conclude that the district court fulfilled the requirements of Rule 11(c). At the hearing required by the rule, the government presented the outline of the plea agreement, including the counts to which Reckmeyer was pleading guilty and the possible penalties resulting from conviction of those offenses. The government stated that the penalties included "the mandatory forfeiture of the defendant's profits from the enterprise, as well as the defendant's interest in, claim against, and/or property and contractual rights of any kind affording a source of influence over the enterprise." After the government outlined

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parole term; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and crossexamine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he was pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

the plea agreement, the district court examined Reckmeyer for the purpose of determining that the plea was voluntary and informed.[4] Responding to the court's inquiry, Reckmeyer stated that he was thirty-three years old, had completed three years of college, had not taken medication within the previous twenty-four hours and was not under the care of a psychiatrist. The court questioned Reckmeyer with respect to his counsel, and Reckmeyer stated that he was satisfied with his counsel and had had sufficient time to discuss the case, including the government's burden of proof. The court then outlined the elements of the offenses to which Reckmeyer was pleading and asked if he understood those elements to which he replied affirmatively.[5]

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[4] Before questioning Reckmeyer, the court informed him that untruthful answers would subject him to additional charges of perjury, that if he did not understand a question, the court would rephrase it, and that he was free to consult with his lawyers before responding to a question.

[5] Because of the importance of this portion of the proceedings to a determination of whether the district court complied with Fed. R. Crim. P. 11(c)(1), we set forth here that portion of the district court's colloquy with Reckmeyer:

> Q Have you discussed the nature and elements of these offenses that the Government has to prove in order to convict you in this case?
>
> A Yes, sir, we have.
>
> Q Have you received a copy of the indictment?
>
> A Yes, sir, I have.
>
> Q Do you understand the charges against you as to Counts 2, 26, and 30?
>
> A Yes, sir, I do.
>
> Q Do you understand that Count 2 charges you that in 1974 and continuing up to and including the return of the indictment, which is on January 9, 1985, that you, along with your brother Robert Reckmeyer, and Bruce Thomason did willfully engage in a continuing criminal enterprise in that you, along with Mr. Thomason

The court informed Reckmeyer of his right to a jury trial, his right to plead not guilt, the presumption of his innocence at any trial, and the burden of proof on the government to prove his guilt beyond a reasonable doubt. Reckmeyer indicated that he understood these rights. The government then recited the facts that it would prove were the case to go to trial. The government stated that Reckmeyer "was the leader and supervisor of a drug organization responsible for the distribution of more than 169 tons of marijuana and more than ten tons of hashish on more than 50 occasions. . . ." In addition, it stated that Reckmeyer was the "organizer, supervisor, and manager of the more than 20 drug employees" with whom he

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and your brother Robert Reckmeyer, did willfully and unlawfully in violation of Title 21, U.S. Code, 841(A)(1), including violations that are alleged in Counts 3, 4, 5, 6, 7, 8, 9, and 10, 11 and 12 of the indictment, and that you had a continuing enterprise for violation of the Comprehensive Drug Abuse Control Act of 1970, 21, U.S. Code, 801, that was undertaken by your [sic], your brother, and Bruce Thomason in concert with at least five other persons, and that you occupied, along with Robert Reckmeyer and Bruce Thomason, a position of organizer, supervisor, and manager of a continuing series of violations from which you obtained substantial income and profit and resources.

Do you understand that charge against you, Count 2?

A Can I—

Q Yes, sir, go ahead and talk to your lawyer. Do you understand the charge in Count 2?

A Yes, sir, I do, your Honor.

Q You've gone over this indictment with your counsel prior to coming here this afternoon?

A Yes, sir, I have.

Q Do you understand that count carries a minimum of ten years in jail to life imprisonment, a fine of up to $100,000 or both, and forreiture [sic] of all profit and interest in the enterprise? Do you understand that?

A Yes, sir, I do.

worked in concert and that he realized $13.7 million in profits from the drug operations, his only substantial income during the period.

Having told Reckmeyer to listen carefully to the statement of the available evidence, the court, upon completion of the government's presentation, allowed Reckmeyer the opportunity to dispute the represented facts. Reckmeyer's attorney, while conceding that there was a factual basis for each count to which he was pleading, stated that Reckmeyer "disputes a number, in fact a great number of the specific facts that have just been set forth in the government's statements of facts." The court then inquired directly of Reckmeyer as to the specifics of his disagreement with the government's statement of the evidence:

> Q What Ms. Tandy [assistant United States attorney] and then Mr. Reed [Reckmeyer's counsel] has said, do you agree that's what you did in this case?
>
> A I just want to be on the record, your Honor, to agree with Mr. Reed that the facts as stated are not the full facts to my knowledge.
>
> Q Well, so I understand, what you're disputing is some of the amounts of money involved and the amounts of drugs by weight and what have you; is that basically it?
>
> A And some of the episodes and how they happened or didn't happen.
>
> Q But you agree that you were involved in a criminal enterprise, is that correct?
>
> A I do agree that I was involved in a continuing criminal enterprise.

> Q Do you agree as to Count 26 that you didn't file, that you filed a false income tax return on Count 26?
>
> A I am pleading guilty to County 26.
>
> Q Do you have any factual dispute with that one [Count 26]? Is it primarily Count 2 [the CCE charge] that you're disputing?
>
> A I'm disputing almost every single fact as stated in their facts.
>
> Q Well, you say you're disputing every single fact, are you telling me you didn't do these things?
>
> A I'm saying I have a different version of the facts as I know them, your Honor.

The district court then summarized the represented facts underlying Count 26, a false tax return charge, and Reckmeyer admitted those facts. The court similarly described the represented factual basis for Count 30, also a false tax return charge, to which under the plea agreement Reckmeyer was to plead guilty. Reckmeyer expressed disagreement with the facts as stated for Count 30 and asked for permission to speak with his counsel. After a recess, Reckmeyer stated that he would plead guilty instead to Count 31—another false income tax count. He was permitted to make that change and to withdraw the guilty plea to Count 30. The court informed him of the elements of Count 31 and advised him to listen carefully to the government's proffer. After the government's recital of facts supporting Reckmeyer's indictment on Count 31 and after Reckmeyer's consultation with counsel, he admitted those facts. The court returned to Count 26 and repeated the factual basis of that count with which Reckmeyer agreed.

The court then provided him an opportunity to raise additional objections to the evidence underlying Count 2.

Reckmeyer disagreed with the amounts of hashish and marijuana specified by the government, and the amount of profits which he allegedly earned.[6]

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[6] The court and the defendant engaged in an exchange which included the following:

> Q On Count 2, do you agree that you were involved in a criminal enterprise for the distribution and possession with intent to distribute the marijuana and hashish?
>
> A That's correct, your Honor.
>
> Q What is your factual dispute with what she said as to the dates or times or amounts or what?
>
> A Specifically the amounts.
>
> . . .
>
> I agree with the facts in general. There are a few specifics in the way the facts came down that I would disagree with.
>
> . . .
>
> The deals as stated on page 5 through 9 are in general correct. I would disagree with some of the specific dates, amounts of money, and amounts of marijuana.
>
> Q Tell me what dates and amounts of money, what you're disputing. Tell me what page you're disputing.
>
> A On page 5, the amount of 169 tons of marijuana.
>
> Q What do you say the amount was? Can you be specific or do you know?
>
> A I don't know right now at this time, your Honor.
>
> Q You think it's something less than 169 tons?
>
> A Yes, sir.
>
> Q But you admit that's what you did on the day that they say you did?
>
> A Between 1972 and 1983 I was involved with distribution of many tons of marijuana.
>
> Q You're just not sure it was 169 tons. Is that what you're bas-

The district court ascertained that Reckmeyer had operated a complex, albeit illegal, enterprise over a ten year period, earning profits of at least three million dollars. It also ascertained that the defendant had attended college for three years. During the course of the proceeding, Reckmeyer demonstrated his astuteness and his knowledge of the indictment. He corrected the government as to facts, and effected a change in one count to which he pled guilty.

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ically saying?

A Yes, sir, that's correct, your Honor.

Q Go ahead. Next item you dispute.

A The same with 10 tons of hashish. Though it was tons of hashish, I don't know how many right now. It's hard to remember back to '72 right at this minute.

Q All right, sir.

A Excess of 100 million dollars, I would have to disagree with that statement, though it was millions of dollars.

Q Can you give me any ballpark figure?

A Maybe one-third of that.

Q All right, go ahead.

Reckmeyer then disagreed with the government's representation that he traded gemstones, gold, jewelry and oriental rugs for drugs. He also was not certain of the amount of marijuana purchased from four named individuals in either 1980 or 1981.

After Reckmeyer's attorney stated that Reckmeyer and he would submit a more detailed estimate of gross receipts, the district court addressed Reckmeyer:

Q Are there any other additions or corrections you want to make to the factual statement that's been stated by the Government here?

A No. I just appreciate your indulgence in going over these items.

Q This is important to you and important to the Government, Mr. Reckmeyer. My time doesn't mean anything as far as this is concerned. You can take as much time as you want.

The court gave him every opportunity to ask questions, to consult with counsel, and to withdraw his plea. The proceeding lasted approximately one hour and twenty minutes.

Our task is to determine whether the court's inquiry was sufficient within the context of those circumstances. The purpose of the Rule 11 requirement "is 'to assure that the accused be not misled as to the nature of the offense with which he stands charged.' There is no simple or mechanical rule as to how the court is to determine defendant's understanding of the charge." 1 C. Wright, *Federal Practice and Procedure, Crim. 2d*, § 173, at 587 & nn.7-8 (1982) (quoting *Smith v. United States*, 324 F.2d 436, 439 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 957 (1964)). The purpose of the rule is not, however, to lay a procedural trap for the government and allow a defendant to change his mind after the Rule 11 hearing and challenge a plea on a technicality. The advisory committee notes to Rule 11 state that "the method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant."

The manner of ensuring that the defendant is properly informed is committed to the good judgment of the district court, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence. *United States v. Dayton*, 604 F.2d 931, 938 & n.11 (5th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 904 (1980). We agree with the analysis of the Fifth Circuit when it said of Rule 11:

> The rule is now at such a level of complexity as to render letter-perfect compliance with each of its many provisions very difficult indeed. One who has pled guilty and done so voluntarily, understandingly, and with knowledge of the consequences of his plea—as the strict compliance with

> *McCarthy* that we today require ensures—has evinced a desire to waive technicalities, to come to terms with the legal system, and to admit his fault. There is something foreign to the spirit of this act, almost invariably done today on the advice of counsel, in a rule that encourages following it by an appeal grounded in a mincing insistance on the punctilios of Rule 11.

Id. at 939-940.

Under this rationale, Reckmeyer had more than adequate understanding of the CCE charge and the range of possible penalties. The court also adequately explained the forfeiture resulting from the CCE conviction. Reckmeyer contends that the court should have informed him specifically that the government had the burden of proving that a particular asset was forfeitable under 21 U.S.C. § 853(a) and that he would have been entitled to a special jury verdict as to each asset to be forfeited. We disagree. The court made it clear to Reckmeyer that the effect of his plea would be to require the forfeiture of all of his assets. At three points in the proceedings, the court informed him of the forefeiture consequence to a guilty plea and asked if he understood that consequence. Reckmeyer indicated that he did. Furthermore, the district court's inquiry into Reckmeyer's awareness of the forfeiture penalty followed the reading of the plea bargain which stated in part:

> It is further a condition of this plea agreement that the defendant must fully assist the United States in the recovery and return to the United States of any drug-related assets, either domestic or foreign, which have been acquired either indirectly or directly through the unlawful activities of his co-defendants, co-conspirators, or other drug traffickers.
>
> The defendant further understands that it is a part of this plea agreement that he must prevent

> the disbursement of any moneys, property, or assets derived from any unlawful drug-related activities, if said disbursements are within his direct or indirect interest or control.
>
> It is a further part of this plea agreement that in addition to the assets listed in Count 2, Paragraph B, the defendant must immediately and voluntarily forfeit to the United States all other domestic and foreign assets in which he has any direct or indirect interest or control, which are the proceeds of unlawful drug activities or are directly or indirectly related to unlawful drug activities.

Reckmeyer stated in open court that he had read and understood the indictment. We evaluate his understanding in the context of his background and his demonstrated intellectual and organizational capabilities. We also consider the manner in which Reckmeyer showed a complete understanding of the plea bargain and the government's case. There can be no doubt that after the district court's inquiries and the reading of the plea agreement, Reckmeyer understood the forfeiture consequences of his plea.

Reckmeyer also asserts that the district court failed to establish on the record a factual basis for the forfeiture of his assets. He contends that the court should have ensured a factual basis for the forfeiture of each particular asset. It is true that Fed. R. Crim. P. 11(f) requires the district court to inquire beyond the agreement to determine if there is a factual basis for the forfeiture of the assets. We agree with the reasoning of the Seventh Circuit in *United States v. Roberts* that "[t]he mere fact that the defendant has agreed an item is forfeitable in a plea agreement, does not make it so. . . ." 749 F.2d 404, 409 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1770 (1985).

We think, however, that the Rule 11 proceeding here established a sufficient factual basis for the forfeiture. The

plea agreement stated that Reckmeyer had insignificant legitimate income during the decade of his drug operations. In its statement of facts, the government repeated that at trial it would have shown that Reckmeyer had insignificant legitimate income from 1974 through January, 1985. Although Reckmeyer stated that his actual profits were only one-third that of the government's estimate, he did not seriously dispute that his only significant source of income was drug related. Furthermore, the forfeiture pled in the indictment exempted relatively small possessions, i.e., items having a retail value of less than $1,000 located at the Reckmeyer's residence. These are the only items which Reckmeyer arguably might have purchased with any legitimate income he might have received. Because Reckmeyer's legitimate income was insignificant, there was more than sufficient factual basis for forfeiture of the forty-one items specified in the indictment and included in the plea agreement by reference to the indictment. Those items included a 675-acre estate in Loudon County, Virginia, various other real property holdings, promissory notes, automobiles and interest in numerous bank accounts. Reckmeyer did not seriously dispute the allegations that he had insignificant legitimate income, and thus could not have acquired these forfeitable assets with legitimate income. In sum, the district court adequately complied with Rule 11(f).

II.

Finally, Reckmeyer's second contention is that the government breached the plea bargain agreement and that the district court erred in not permitting him to withdraw his plea as a result of such a breach.[7] He argues that the

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[7] The relevant portion of the agreement is:

It is a further part of this plea agreement that the defendant must fully and truthfully cooperate with the United States Government in

government violated the provision assuring against the use of anything which he had said to law enforcement agents, government attorneys, grand juries or at any trial; it did so by providing the probation office with information that he had given the government about his drug activities which had continued during the period he was under investigation. Based on this information, the probation officer reported to the district court that Reckmeyer had purchased 21,000 pounds of hi ,h-grade marijuana in late 1984, and had placed an additional order for 100,000 pounds to be delivered during the fall of 1985. The government concedes that it obtained this information from Reckmeyer during his debriefing.

Reckmeyer is entitled to the enforcement of the agreement which he entered into with the government and which was the inducement to his guilty plea. *Santobello v. New York,* 404 U.S. 257, 262 (1971). *See Cooper v. United States,* 594 F.2d 12, 15-17 (4th Cir. 1979); *United States v. Cook,* 668 F.2d 317, 319-21 (7th Cir. 1982) (citing *United States v. Bowles,* 585 F.2d 851, 856 (7th Cir. 1978)). *See also*

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its investigation of the importation and distribution of controlled substances and related unlawful activities. This cooperation is to include, but is not limited to, truthful and complete debriefings of Mr. RECKMEYER's knowledge concerning unlawful drug activities and related unlawful activities. In this connection, Mr. RECKMEYER understands that he must fully disclose and provide information to the Government including any books, papers or documents that are of evidentiary value to the Government's investigations. The defendant also must testify fully and truthfully before any grand juries and at any trials at which the Government determines his testimony may be relevant. It is a further part of this plea agreement that the Government agrees not to use against the defendant anything he says to law enforcement agents, government attorneys, to any grand juries or at any trial unless he should make false statements or commit perjury. During debriefings of the defendant his counsel may be present.

. . .

It is a part of this agreement that the Government reserves its right to fully allocute at the time of sentencing.

Mabry v. Johnson, 467 U.S. 504 (1984). We must determine, therefore, the scope of the government's agreement not to use against Reckmeyer information which he provided.

The government contends on appeal, as it did before the district court, that the agreement did not limit its ability to bring to the attention of the court relevant information regarding the defendant, including information which it obtained directly from Reckmeyer. It contends that the plea agreement, read as a whole, restricted its ability to use Reckmeyer's statements in any subsequent criminal prosecution, but that in view of the specific reservation in the agreement of the right to allocute at the time of sentencing, the agreement did not prevent the government from providing the probation office with relevant information. *See supra* note 7. The government also asserts that it was free to provide the information to the parole officer because it had a duty to provide the sentencing court with complete and accurate information concerning the defendant to enable the court to impose an appropriate sentence. *United States v. Block,* 660 F.2d 1086, 1091 (5th Cir. 1981)), *cert. denied,* 456, U.S. 907 (1982).

We dispense with this latter argument first. The government, of course, does not have the right to make an agreement to withhold relevant factual information from the court.[8] *Id.* at 109 1-92; American Bar Association Standards Relating to the Administration of Criminal Justice, § 3-6.2 (1980) (prosecutor should assist court in basing its sentence on complete and accurate information for use in the presentence report; prosecutor should disclose any information in the prosecutor's file relevant to the sentence). It is equally clear, however, that the government

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[8] The district court, citing *Block,* denied Reckmeyer's motion to strike the information from the presentence report because of the government's obligation to present relevant information to the court.

cannot properly enter into such an agreement with an unsuspecting defendant and then seek judicial relief from its promise on the basis of its impropriety. A government prosecutor's specific duties of fairness to a defendant and scrupulous honesty in dealing with court would simply require that such an improper plea bargain be voided.[9]

We are, however, persuaded by the government's argument that it did not agree to withhold the information furnished by Reckmeyer from the sentencing court. It contends that the agreement "not to use . . . [such information] against him" was an agreement not to use it in other prosecutions. The government's reservation in the agreement of the right to allocute at sentencing supports this contention, and does contemporaneous correspondence concerning this provision. Several days prior to sentencing, but after Reckmeyer indicated an intention to withdraw his guilty plea on the basis of alleged Rule 11 violations, Reckmeyer's counsel wrote the assistant United States attorney:

> This is to confirm our conversations this afternoon. You have advised me that the Government

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[9] The government asserts for the first time on appeal that even if it breached the agreement, Reckmeyer first breached it by lying during the debriefing and by attempting to distort the results of his polygraph examination. Without reaching the merits of this contention, we note that it was for the district court to determine whether the defendant breached the agreement—and not for the government to make a unilateral determination and then proceed to fashion its own remedy. *See United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976) (manifest impropriety in permitting the government, without satisfying a judge that the evidence proves that a defendant broke his promise, to escape from the obligation the government undertook in the plea bargain). We, therefore, do not consider this argument as a basis for sustaining the government's position on appeal.

We also note that the government could have avoided confusion over the plea agreement's meaning by more careful craftsmanship in the agreement.

> takes the position that any statements that Chris makes during the course of any debriefing during the cooperation phase of his Plea Agreement cannot be used against him in any criminal case with the following: (1) exception that he may be prosecuted for perjury or false statement with respect to any such statements, and (2) that any such statements maybe used against Chris as impeachment or rebuttal if his plea is withdrawn or vacated for any reason and he subsequently testifies on his own behalf in this case.
>
> We do not agree with the latter position and take the position that the Government may not use the statements that Chris makes against him in any way except in a prosecution for perjury or false statement. I note that your position with respect to the use of Chris' statements for impeachment or rebuttal has been made known to me only today.

The agreement also provided that the government would advise the district court of Reckmeyer's cooperation with the government's investigation of related drug activities. This obligation is consistent with the government's construction of the plea agreement. Advising the court would necessarily involve informing the court of the substance of the defendant's statements in debriefing.

Reckmeyer relies heavily upon the decision of the Seventh Circuit in *United States v. Cook*, 668 F.2d 317 (7th Cir. 1978). We do not find the rationale underlying the decision in *Cook* dispositive here because of the difference between the plea agreement in *Cook* and the one between the government and Reckmeyer in the instant case. In *Cook*, the government agreed to "make no recommendation whatsoever as to any possible punishment" and "to not offer anything at all in aggravation." 687 F.2d at 318. In that case it violated its promise, and the Seventh Circuit

held that, regardless of whether the government should have ever made such a promise, the defendant was entitled to plead anew. *Id.* at 319-20. In the instant case, the promise not to use Reckmeyer's statements related to possible future prosecutions, not to the sentencing procedures which gave effect to the very guilty plea into which Reckmeyer had entered.

In view of the above, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-5158

UNITED STATES OF AMERICA,

Appellee,

versus

CHRISTOPHER FREDERICK RECKMEYER,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (CR-85-00010-A).

Argued: December 6, 1985 Decided: March 21, 1986

Before WIDENER, PHILLIPS and SPROUSE, Circuit Judges.

Stanley J. Reed (Lerch, Early, Roseman & Frankel on brief) for Appellant; Karen P. Tandy, Assistant United States Attorney (Elsie L. Munsell, United States Attorney; William G. Otis, Assistant United States Attorney; Justin W. Williams, Assistant United States Attorney; Kent S. Robinson, Assistant United States Attorney on brief) for Appellee.

The Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc were submitted to this Court. As no member of the Court requested a poll on the Suggestion for Rehearing In Banc, and

As the Panel considered the Petition for Rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the Petition for Rehearing and Suggestion for Rehearing In Banc are denied.

Entered at the direction of Judge Sprouse, with the concurrents of Judge Widener and Judge Phillips.

For the Court,

/s/ JOHN M. GREACEN
JOHN M. GREACEN
CLERK

APPENDIX C

STATUTORY PROVISIONS

1) Rule 11(c)(1), Fed R. Crim. Pro.:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendre, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order him to make restitution to any victim of the offense;

2) Rule 31(e), Fed. R. Crim. Pro.:

> (e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

3) 21 U.S.C. § 848:

> **§ 848. Continuing Criminal Enterprise**
>
> **Penalties; forfeiture**
>
> (a) Any person who engaged in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in Section 853 of this title; except that if any person engages in such activity after one or more prior

convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in Section 853 of this title.

Continuing Criminal Enterprise Defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violated any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a party of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(b) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and Section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code Secs. 24-203 to 24-207), shall not apply

4) 21 U.S.C. § 853(a) and (d);

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II if this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constitution, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of Section 848 of this Title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Rebuttable presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter III of this chapter, is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter III of this chapter, or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter III of this chapter.